NTCA

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

The Voice of Rural Telecommunications

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April 2, 2012

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

***Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208**

Dear Ms. Dortch:

On Friday, March 30, 2012, Shirley Bloomfield and the undersigned met on behalf of the National Telecommunications Cooperative Association ("NTCA") with Zachary Katz, Chief of Staff to Chairman Julius Genachowski, Michael Steffen, Wireline Legal Advisor to the Chairman, Sharon Gillett, Chief of the Wireline Competition Bureau (the "Bureau"), and Carol Mattey, Deputy Chief of the Bureau, to discuss ongoing reform efforts in the above-referenced proceedings.

Regression Analysis Caps. We highlighted a series of concerns with the proposed regression analysis-based approach to developing and implementing caps on capital and operating expenses supported through the federal universal service fund ("USF"), and urged action in several respects.

First, we emphasized the importance of ensuring predictability in connection with USF support, consistent with the Communications Act of 1934, as amended. Although certain components of high-cost USF support may have been to some degree unpredictable in the past because of the effects of existing caps within those mechanisms, the layering-on of additional unpredictability within these mechanisms – particularly through caps that are not transparent – now gravely threatens continued investment in and the sustainability of rural broadband.

Indeed, the dynamic and opaque alteration of the caps as currently contemplated presents substantial challenges for all rural local exchange carriers ("RLECs"). NTCA members have expressed a consistent fear that any given RLEC might be the "next one" to trigger the caps, and it should also be noted that lenders and investors have expressed deep confusion at attempting to forecast the effects of any caps because of their dynamic nature. We explained that this unpredictability has led even those that appear unaffected by the caps at first – and even those individual RLECs that might be poised to receive some incremental support in the first year – to avoid much-needed broadband deployment or upgrades (including stimulus-related construction efforts) for fear of triggering the caps in subsequent years. Allowing such uncertainty to perpetuate would be contrary to the very purpose of the National Broadband Plan, the President's own stimulus initiatives, and the stated objectives of reform.

Second, we highlighted a series of substantive underlying problems with the proposed regression analysis-based approach to developing and implementing caps; the specific points raised were consistent with a recent *ex parte* filing submitted by NTCA. *Ex Parte* Letter from Michael R. Romano, Senior Vice President-Policy, NTCA, to Marlene H. Dortch, WC Docket No 10-90, *et al*. (filed Mar. 23, 2012). We also discussed that certain of the data underlying the regression analysis are flawed in ways that would have "ripple effects" throughout the models and affect the support distributions for many carriers. We noted that there appears to be confusion about the procedure to have such data corrected in a timely and efficient manner. *See Ex Parte* Letter from Joshua Seidemann, Director – Policy, NTCA, to Marlene H. Dortch, Secretary, WC Docket No 10-90, *et al*. (filed March 21, 2012). Based upon the discussion in this meeting, however, NTCA understands that the Bureau does intend to receive input from companies and then promptly remedy underlying data shortcomings in the regression analysis models ***without*** the need for the filing of individual company waivers.

If the Federal Communications Commission (the "Commission") and the Bureau will not adopt the alternative constraint submitted by NTCA and other rural associations last year for placing reasonable, transparent, locally-tailored, and prospective controls on the growth of USF by tying a schedule for future investment to replacement of depreciated plant, *see* Comments of NTCA, *et al*. (filed April 18, 2011), at Appendix A, it would be appropriate at a minimum to publish a revised proposal for the regression analysis-based caps and provide reasonable opportunity for further comment prior to adoption and implementation. Indeed, in light of the substantive and data-related concerns associated with the regression analysis models as they stand currently, NTCA believes that the Commission's professed commitment to "no flash cuts" and proper administrative procedure should dictate against quick fixes that would have materially modified models take effect on only several weeks' notice before July 1, 2012. *See also Ex Parte* Letter from Kenneth C. Johnson, Counsel for Central Texas Telephone Cooperative, WC Docket No 10-90, *et al*. (filed March 23, 2012) (citations omitted). We also noted that adopting materially modified caps on only a few weeks' notice would give affected companies little, if any, time to evaluate the effects of those caps and seek waivers (or further corrections of data) as needed – thereby undermining the value of the waiver process as a safeguard and calling into question the validity of the administrative procedure employed.

Further Notice Concerns. NTCA expressed concern with the adoption of any further caps, cuts, and constraints to USF support and intercarrier compensation ("ICC") in the wake of the Commission's November 18, 2011 Order in the above-referenced proceedings. The Commission itself has described its actions in that Order as "sweeping reforms" and an "overhaul [that] transforms the FCC's outdated universal service and intercarrier compensations systems into a new Connect America Fund, or CAF, representing the most significant policy step ever taken to connect all Americans to broadband." *FCC Releases 'Connect America Fund' Order to Help Expand Broadband, Create Jobs, Benefit Consumers*, Commission Press Release (rel. Nov. 18, 2011). We noted that the "dust has not even started to settle" on these "sweeping reforms" and the resulting support and revenue reductions adopted in that Order. We also highlighted that numerous questions and substantial confusion continue to surround implementation of the Order, and that end users already appear to face the prospect of significant rate increases as a result of the actions just taken.

In light of these concerns, the Commission, rural consumers, service providers, and lenders and investors would be far better served by first answering the many pending questions and taking the time to implement and evaluate the impacts of the "overhaul" just made, rather than racing forward with further steps such as: (i) re-prescribing the authorized interstate rate-of-return; (ii) extending the still-being-developed regression analysis-based caps to Interstate Common Line Support; (iii) reducing USF support in areas served by a purported "unsubsidized" competitor; or (iv) reducing any other ICC rate elements.

Indeed, many lenders, investors, and service providers are still processing and attempting to evaluate the changes just adopted, even though it is not entirely possible to do so because some of the most significant changes remain subject to ongoing development by the Bureau. (It should also be noted for the record that this is the reason that only a few requests for waivers of the reforms adopted last fall have been filed to date – most of the rules that would create the need for a waiver are pending further implementation and/or interpretation.) Racing forward to consider yet more changes when the significant reforms adopted last fall have yet to be implemented or even fully understood provides no predictability in universal service, runs contrary to the objectives of promoting broadband deployment, and only perpetuates regulatory uncertainty. We urged the Commission to find expressly that it would only assess the need for further reforms after a reasonable opportunity to implement fully and then evaluate the effects of the sweeping reforms already adopted in the Order.

Safety Net Additive. NTCA also raised concerns with respect to the "flash cut" phase-out of investment-based Safety Net Additive ("SNA") support for those who deployed broadband-capable networks in 2010 and 2011. These companies undertook investment in good faith based upon then-current rules, and would have qualified for cost recovery but for the two-year lag in such recovery built into those rules. Although NTCA disagrees generally with the elimination of SNA support. such elimination is particularly inequitable and improper as to companies that lose access to USF support associated with investment in broadband-capable networks during the two years leading up to the release of the Order simply because of a regulatory procedural lag.

<u>Audit Reporting Concerns.</u> Finally, we called attention to a letter that NTCA had submitted with respect to certain financial reporting requirements. *Ex Parte* Letter from Michael R. Romano, Senior Vice President-Policy, NTCA, to Marlene H. Dortch, WC Docket No 10-90, *et al*. (filed Mar. 27, 2012). In particular, we urged the Commission to: (1) permit all RLECs to submit a financial reporting form analogous to RUS Form 479, as signed by company representatives, in August or the early fall of each year in lieu of requiring certified audit reports by April 1 of each year; (2) allow RLECs to prepare the information on such a form through a compilation process in lieu of annual reports of financial condition and operations that have been audited and certified by an independent certified public accountant; and (3) allow RLECs to submit financial data under seal pursuant to the established protective order process, and also permit any given RLEC to seek such additional protection as it may deem necessary and appropriate under applicable law.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Sincerely,

<u>/s/ Michael R. Romano</u>
Michael R. Romano
Senior Vice President - Policy

cc: Zachary Katz
Michael Steffen
Sharon Gillett
Carol Mattey